Nos. 117, 118 and 119

In the Supreme Court of the United States

OCTOBER TERM, 1955

NO. 117

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
Appellant,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

NO. 118

UNION PACIFIC RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.

NO. 119

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

UNION PACIFIC RAILROAD COMPANY, ET AL.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

MOTION TO AFFIRM IN NOS. 117 AND 119 AND REVERSE IN NO. 118

BERT L. OVERCASH,
Counsel of Record for the Five State Appellants,
State Capitol Building,
Lincoln, Nebraska.

ELMER B. COLLINS,
Counsel of Record for Railroad Appellants,
1416 Dodge Street,
Omaha, Nebraska.

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Union Pacific Railroad Company; Chicago and North Western Railway Company; Chicago, St. Paul, Minneapolis & Omaha Railway Company; Northern Pacific Railway Company; Great Northern Railway Company; The Atchison, Topeka and Santa Fe Railway Company; Wabash Railroad Company; Washington Public Service Com-

1 The appeals were filed in this Court on May 31, 1955, and originally assigned Docket Nos. 837, 838, and 839, respectively.

mission; Public Utilities Commissioner of Oregon; Board of Railroad Commissioners of the State of Montana; State Board of Equalization and Public Service Commission of Wyoming; State of Nebraska and Nebraska State Railway Commission, appellees in Nos. 117 and 119, and appellants in No. 118, move that the portion of the judgment of the district court enjoining the order of the Interstate Commerce Commission in part, from which portion of the judgment the appeals were taken in Nos. 117 and 119, be affirmed, and that the portion of the judgment sustaining the order in part, from which the appeal was taken in No. 118, be reversed,[2] and the case remanded to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

STATEMENT

These are direct appeals from a final judgment entered December 20, 1954, by a three-judge district court convened pursuant to 28 U. S. C. 2284, 2325, sustaining "in part" and enjoining "in part" an order of the Interstate Commerce Commission requiring the railroad appellants herein and numerous other railroads to establish and maintain through routes and joint rates in connection with The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") "the same" as the joint rates maintained by appellants and other railroads over transcontinental routes embracing the lines of Union Pacific Railroad Company and others on certain commodities that move by railroad between points in the four northwestern states, Washing-

2 As a precedent for this part of this motion, see *Williamsport Co. v. United States*, 277 U.S. 551, 556-557, and *U.S. v. Pan American Corp.*, 304 U.S. 156, in which a motion to reverse was filed, although not mentioned in this Court's decision.

ton, Oregon, Montana and Idaho, and points in the eastern and southern parts of the United States described in the order.[3]

The Commission's order (Appendix C to Statement as to Jurisdiction in No. 118) was issued upon a complaint filed with the Commission by the Rio Grande demanding that the defendants named in the complaint be ordered to establish and maintain in connection with the Rio Grande joint rates "the same" as the joint rates maintained by those defendants over many hundreds of thousands of through routes over their connecting lines between points in the areas just described. The joint rates are substantially lower than the combination or sum of the local rates that would apply if the traffic moved via the Rio Grande.

The Rio Grande has been a chronically bankrupt and "financial needs" railroad during most of its existence. Its President testified frankly that the purpose of the complaint in this case was to improve the Rio Grande's financial position by diverting for a "bridge" haul over its line as much as possible of some 172,000 carloads of traffic annually hauled for many years over Union Pacific routes.[4]

The Commission evaded the "financial needs" prohibition of Section 15(4) of the Interstate Commerce Act by asserting in its report that it gave no consideration to the Rio Grande's "financial needs". It found that the traffic the Rio Grande seeks to divert to its line or-

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3 See map showing lines and termini of the Union Pacific, the Rio Grande and other pertinent data, Appendix A to Statement as to Jurisdiction of these appellants, No. 118.

4 See footnotes pages 13-14, Jurisdictional Statement in No. 118.

dinarily moves over the Union Pacific routes through Wyoming because those routes have lower rates and are from 33 to 219 miles shorter than any route that could be made by including the Rio Grande and are more than 50% shorter than many of the routes demanded by the Rio Grande.[5] The Commission also found that diversion of the traffic to the Rio Grande would short haul existing Union Pacific routes at least 925 miles on each shipment so diverted, and that movement of the traffic via the Rio Grande would require at least 24 hours more time in transit and one or two more interchanges of traffic between connecting carriers.

The Commission further found that Union Pacific routes are efficiently operated, furnish good service and are adequate to move "the present volume of traffic and any additional volume that may be anticipated in the foreseeable future." It also found that operating conditions on the Rio Grande's mountainous route between Ogden and Denver are "more onerous" than those on the lines of the Union Pacific or any other western line and that dissimilarities in transportation and operating conditions were so substantial and unfavorable to the Rio Grande as to prevent a finding of discrimination against the Rio Grande resulting from refusal of lines comprising Union Pacific routes to make their joint rates applicable over the Rio Grande.

Notwithstanding those findings, the Commission held that the Rio Grande's's combination rates were unreasonable and unduly prejudicial to shippers using its line and ordered the railroad appellants herein and other

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5 The Commission's findings are summarized at pages 18-23, Jurisdictional Statement in No. 118, and its report is printed as Appendix B to that Statement.

railroads to make their joint rates applicable via the Rio Grande on the several articles named in the order, which articles comprise about 57,000 carloads annually, or one-third of the traffic the Rio Grande seeks to divert to its line.

The Commission, further disregarding its own findings as to the efficiency, surplus capacity and shorter mileage and transit time of Union Pacific routes compared to the Rio Grande, nevertheless, asserted that shippers of perishable food products from the northwest area to markets in the eastern and southern parts of the country are "debarred from effective participation" in the marketing system for such products because they would have to pay higher rates if they shipped via the Rio Grande than they pay when shipping over the shorter and faster Union Pacific routes from the same origins to the same destinations, and condemned Union Pacific routes as "inadequate" and less economical than the Rio Grande route, because "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available and higher rates apply".

The Commission rejected the Rio Grande's contention that through routes for the traffic concerned were already in existence via its line and that the joint rates it demanded should be required without regard to the short haul prohibition of Section 15(4) of the Act. The Commission held that prescription of any of the joint rates demanded by the Rio Grande would have to be grounded upon clause "(b)" of Section 15(4), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is

needed in order to provide adequate, and more efficient or more economic, transportation".[6]

The district court (Circuit Judge Johnsen dissenting on the ground that the Commission's order was void and should be enjoined in its entirety) held that the order is valid only to the extent that it embraces shipments of the articles named therein to stop for processing, milling, grazing cattle in transit and other commercial operations known as "transit privileges", at points on the Rio Grande and later reshipped to destinations beyond its termini. (App. D, Jurisdictional Statement, No. 118.) In sustaining the order to that extent, the court adopted a different theory or basis from that on which the Com-

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6 Section 15 (4) provides

"In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

mission rested its order. The Commission had correctly held that it could not order through routes via the Rio Grande short-hauling Union Pacific routes unless it could first find that Union Pacific routes were "inadequate", and, as stated above, it found them inadequate because they were not available at points served exclusively by the Rio Grande, and because higher rates apply over the Rio Grande.

The majority of the court held that the evidence does not support or justify the Commission's finding that service over Union Pacific routes is inadequate or less economical than Rio Grande routes. But the court proceeded to hold that transportation service for the involved traffic over the *proposed* Rio Grande route is "inadequate and also inefficient and uneconomical" and that the through routes and joint rates ordered by the Commission are justified for shipments stopped for in-transit privileges at points on the Rio Grande and later reshipment to points beyond its termini. For shipments *not* stopped for in-transit privileges on the Rio Grande, the court held the order invalid.

ARGUMENT

The Part of the Judgment of the District Court Involved in Nos. 117 and 119 Should Be Affirmed

The appeals in Nos. 117 and 119 are from that part of the judgment of the district court which enjoins the order in part, and rejects and nullifies the Commission's condemnation of Union Pacific routes as "inadequate and less economical" than the Rio Grande route, on the novel and fantastic grounds, (1) that "at points on the Rio Grande, the Union Pacific routes and the joint rates which apply over them are not available and higher rates

apply", and (2) that shippers of perishable food products from the northwest area to markets in the eastern and southern parts of the country are "debarred from effective participation" in the marketing system for such products because freight rates are lower over Union Pacific routes than the same shippers would have to pay if they routed their products for a "bridge" haul over the Rio Grande from the same northwest origins to the same far eastern and southern destinations.

The Commission's condemnation and short-hauling of the shorter and faster Union Pacific routes on these grounds is so manifestly erroneous as to vitiate and nullify the entire order, and we submit that to the extent the judgment below enjoins and annuls the order, the judgment should be affirmed without awaiting oral arguments and briefs. A similarly frivolous and untenable reason for condemning and short-hauling a shorter existing route under Section 15(4) of the Act was flatly rejected by this Court, *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538, in the first short-hauling through routes case considered by this Court after Congress conferred the through routes powers on the Commission.

The majority opinion below (App. D to Jurisdictional Statement, No. 118) correctly holds that transportation service over the shorter, faster and efficient Union Pacific route is clearly adequate, and as "economical" as it would be via the Rio Grande under the order because the joint rates ordered by the Commission for application via the Rio Grande would only *equal* the joint rates now applicable to the same traffic moving over Union Pacific routes. Those conclusions of the court are inescapable from the Commission's own findings (see pp. 18-23,

Jurisdictional Statement, No. 118), and upon them the court was clearly right to the extent it enjoined the order.

In the face of its own findings, the Commission's conclusion that the required through routes and joint rates via the Rio Grande are "necessary and desirable in the public interest" is but an assertion that "public interest" requires that the traffic be diverted to and move over the longer Rio Grande as a "bridge" line instead of the shorter and direct Union Pacific line for part of the distance between the far northwest and the eastern and southern parts of the country. A similar misinterpretation by the Commission of the term "public interest", in an effort to deprive the Missouri Pacific Railroad of a 300-mile haul and leaving it a 46-mile haul by ordering through routes for the benefit of a 40-mile, financially weak railroad, was rejected in *Missouri Pac. R. Co. v. United States,* 21 F. (2d) 351. The three-judge district court unanimously nullified the order, and held that public interest "does not justify the taking of a part of petitioner's [Missouri Pacific] line and using it as an instrumentality for producing income for the Subiaco [railroad] in competition with and to the detriment of the petitioner". The judgment of the district court was unanimously affirmed in *United States v. Mo. Pac. R. Co.,* 278 U. S. 269, in which this Court held (p. 277) that the short haul prohibition in Section 15(4):

> "* * * lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. *The purpose is to protect the long haul routes of carriers.*" (Italics added.)

The addition in 1940 of clause (b) to Section 15(4) did not, as the Commission apparently thinks, abandon the steadfast purpose of Congress to protect the long hauls of carriers. In *I. C. C. v. Columbus & Greenville Ry.*, 319 U. S. 551 (decided June 7, 1943), this Court quoting Section 15(4) as amended in 1940, held at page 555:

> "Disregard of the statutory requirements for the establishment of joint tariffs may have important substantive consequences. The Interstate Commerce Act contemplates that joint railroad rates shall be established only by concurrence of the participating carriers or by the Commission in proceedings under §15. In the exercise of its power under §15 to fix joint rates without the concurrence of the participating carriers, *the Commission is required by §15(4) to protect, in stated circumstances, the long hauls of participating carriers, and to give reasonable preference to originating carriers.*" (Italics added.)

The more recent decision (June 2, 1952) of this Court, in *Thompson v. United States*, 343 U. S. 549, plainly shows that the Commission is not justified in construing the 1940 addition of clause "(b)" as, in effect, repealing the short haul prohibition. At page 555, this Court said:

> "The Commission's effort to limit by construction the impact of the short-hauling restriction on its power to establish through routes was rejected by this Court in *United States v. Missouri Pacific R. Co.*, 278 U. S. 269 (1929). Following this decision, the Commission asked Congress to delete completely the short-hauling restriction. In the Transportation Act of 1940, Congress refused to eliminate the restriction against short hauling, but adopted a compromise under which the restriction against short hauling was retained subject to a new exception applicable only where the Commission makes the special findings listed in the amended Section 15(4)."

The Commission's holding in the instant case that the 1940 addition of clause "(b)" as an exception to the short haul prohibition empowers it to short haul the adequate, shorter, faster and cheaper Union Pacific routes is exactly contrary to the Congressional intent as shown by the history of legislative action leading to the enactment of clause "(b)". In its report No. 404, April 22, 1937, on Senate Bill 1261, 75th Congress, 1st Session, the Senate Committee on Interstate Commerce said at page 2:

> "Your committee feels that the shippers of the country should be given the right to use the *shortest, quickest, and cheapest routes available* * * * The bill does not give the Commission power to order the railroads to route shipments in any particular way, but merely provides that *if a shorter route exists*, and if it is in the public interest for the shippers to have this route available, the railroads shall, upon the Commission's order, publish the route and rate in their tariffs. It is not the intention of the committee to interfere with the right of the trunk lines to their long haul, except where this right conflicts with the shippers' right to the *shortest route and lowest rate*. If there is this conflict, the *shipper is merely given the opportunity, if he wishes, of using the shorter or cheaper route.*" (Italics added.)

That the Congressional purpose to protect the long hauls of carriers and to prevent the Commission from depriving them of long hauls by diverting traffic to financially weak short lines, was not abandoned by the 1940 enactment of clause "(b)" is plainly demonstrated by the fact that in the same enactment it added to Section 15(4) the provisions:

> "That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

On its own findings that the Union Pacific routes are shorter, faster, efficient and adequate to haul any foreseeable volume of involved traffic at lower rates than those maintained over the longer, more onerous, Rio Grande route, the Commission clearly was precluded from condemning the Union Pacific routes as "inadequate and less economical" than the Rio Grande, and the lower court was correct in so holding.

A second and equally erroneous and untenable basis on which the Commission attempts to rest its order is the Commission's newly invented criterion that short-hauling the Union Pacific routes is justified on the ground that the marketing system for perishable food articles requires "as wide a distribution as possible", "as many routes as possible", "as much flexibility as possible" and "as many markets and outlets as possible". The Commission invented this new criterion in the face of the statutory standard of Section 1(4) of the Act which, by its own terms, and as held by this Court in the *Thompson* case, p. 558, requires carriers to establish *only* "reasonable through routes". The Commission's new criterion nullifies not only the statutory standard and the short haul prohibition, but also the rule and norm of its prior decisions[7] that when sufficient through routes have been established adequately and efficiently to move the traffic from origin to destination, additional through

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7 In *Sec'y of Agriculture v. United States*, 347 U.S. 645, 653, this Court refused to sustain an order because of the Commission's unexplained departure from the "norms" of its prior decisions, and its failure to spell out the "legal basis" of its decision.

routes are not justified, to say nothing of as many routes "as possible" to short haul admittedly adequate, more efficient, and shorter existing routes by requiring longer and more onerous routes.[8]

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8 Examples are:

In *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I.C.C. 331, 333-334 the Commission said:

"Section 15(4) of the act has been in its present form since September 18, 1940. In several proceedings since then, reasonable through routes which short haul one or more carriers have been prescribed. See *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I.C.C. 333 (sustained in *Pennsylvania R. Co. v. United States*, 323 U.S. 588); *Allied Mills, Inc., of Virginia v. Alton R. Co.*, 272 I.C.C. 49; *California Milling Corp. v. Atchison, T. & S. F. Ry. Co.*, 269 I.C.C. 725 and 274 I.C.C. 120. In the first two of those proceedings it appeared that the routes required to be established eliminated expensive out-of-line hauls, and in the latter proceeding the routes required were shown to be shorter in many instances than those which had existed. In all of those proceedings the routes required were at least as economical, from the standpoint of the carriers as well as of the shippers, as were most of the existing routes.

"The instant situation differs. All of the routes sought are substantially longer than the present routes, and their establishment would appear to encourage wasteful and uneconomic transportation. In addition, because of the circumstances here present, we believe a requirement that the routes sought be established would not 'give reasonable preference' to the originating carrier."

In *Kansas City Hay Dealers Asso. v. C.G.W.R.R.Co.*, 49 I.C.C. 372, at page 377, the Commission held:

"To compel the application of short-line rates over indirect and longer routes, merely as a means of providing a channel of doubtful benefit to comparatively few shippers, would lay an unnecessary expense upon the railroads *against the interest of the public as a whole*. When joint rates that are neither unreasonable nor unduly prejudicial are maintained over direct routes *adequate response is made to the reasonable requirements of the public*, and carriers should not be required to perform wasteful transportation by maintaining the same rates over indirect and more circuitous routes." (Italics added.)

In *C. & C. Traction Co. v. B. & O. S.W.R.R.Co.*, 20 I.C.C. 486, 492, the Commission said:

"* * *we have little sympathy with, and will not ordinarily lend our aid to, an effort by one road to secure traffic that is reasonably tributary to another road by compelling the latter to join with it in through routes and rates* * *"

A third patently erroneous basis for the order is that the Commission, though positively declaring that any order requiring through routes and joint rates via the Rio Grande in this case must be grounded on the provisions of Section 15(4)(b), thoroughly mutilated, departed from and declined to make the findings required by clause "(b)", which requires findings that "the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation", and which this Court held in the *Thompson* case, p. 555, to be "applicable only" where the Commission makes the "special findings" so required. The Commission here departed from the standards of that clause, first, by asserting a necessity for "more" adequate transportation, and, second, by finding the Rio Grande route "necessary and desirable" *only* to provide "adequate and more economic transportation". It did not find, as required by clause "(b)", that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than Union Pacific routes. And, although it found that the Rio Grande route was necessary to provide "more economic" transportation, this is obviously an arbitrary and incorrect assertion for, as pointed out by the majority opinion below, the transportation via the Rio Grande could not be "more economic" because the rates ordered via the Rio Grande are "the same" as, and would only "equal" present rates via Union Pacific routes, and wasteful and uneconomical transportation would necessarily result from the fact that every carload that might be diverted to the Rio Grande would require from 33 to 219 more miles of transportation effort and at least 24 hours more time than if moved via Union Pacific routes. Clearly, the requirement in clause "(b)" of a finding that the *proposed* new route will provide "more economic" transportation may not be satisfied merely by reducing

the higher rates of the Rio Grande so as to equalize them with rates via Union Pacific routes, and this would be so even if the Rio Grande route were not more onerous and longer than Union Pacific routes.

Contrary to the positive declaration in the Commission's report that any requirement of through routes and joint rates via the Rio Grande must be grounded on findings as specified in Section 15(4)(b), the Jurisdictional Statement of the Government asserts at pages 10 and 11 that the Commission's finding that the combination rates via the Rio Grande were unreasonable and unduly prejudicial to shippers using that line constitutes "an independent basis of the Commission's order establishing through routes". The Rio Grande's Statement makes the same assertion at page 13. Thus, both of those appellants would justify the order on a different statutory basis than that on which it rests, by having this Court ignore the Commission's direct powers to cure unreasonable rates under Section 1 and unduly prejudicial rates under Section 3(1) and hold that the Commission has power to order joint rates over the longer, more onerous Rio Grande route that would exactly equalize rates maintained over shorter, adequate and more efficient Union Pacific routes; upon the Commission's mere assertion that equalization of the rates over the two routes is necessary and desirable in the public interest because it has found the Rio Grande's higher rates unreasonable and unduly prejudicial. No decision can be found to support such contentions, and they are clearly erroneous and squarely in conflict with the statutory pattern and specific independent provisions thereof, and with decisions of this Court. The decision in *Central R. R. Co. v. United States*, 257 U. S. 247, 257, holds that the Commission has

ample direct powers to remedy unreasonable rates and to cure undue prejudice and discrimination, and that the Commission may not "accomplish by indirection" that which it has direct power to accomplish; *Thompson v. United States, supra,* makes it plain enough that the Commission may not use its power to prescribe reasonable rates as a means of evading or circumventing the short haul prohibition in Section 15(4); *Texas & Pacific Ry. Co. v. U. S.,* 289 U. S. 627, at page 650, lays down the positive rule that, where undue prejudice or discrimination is found, the most the Commission can require is that the violation be eliminated and that "an actual alternative" be given the offending carriers to abate the violation; and *United States v. Mo. Pac. R. Co.,* 278 U. S. 269, plainly precludes any interpretation or use of the Commission's through routes powers for the financial benefit of the Rio Grande, or any purpose not clearly within the legislative intent.

At page 11, the Government's Jurisdictional Statement argues:

> "The Commission found that the Union Pacific, by refusing to establish through routes and joint rates with the Rio Grande, has subjected shippers who use the latter's route to undue prejudice, and, by the same token, has given undue preference to their competitors who use the Union Pacific routes. Such action would appear to violate the statutory prohibition against a carrier subjecting any person to preference or prejudice 'in any respect whatsoever.'"

The Rio Grande's Jurisdictional Statement at page 13 asserts that the Commission's findings of undue prejudice in violation of Section 3 against shippers using the Rio Grande affords a legal basis for the Commission's

requirement of through routes and joint rates and that, in view of the Section 3 finding, the restriction in Section 15(4) on the Commission's power to require short-hauling through routes does not apply.

While Section 15(4) provides that in establishing through routes, the Commission shall not, "except as provided in Section 3," require a carrier to short haul itself, there is no "provision" in Section 3 which even hints that the Commission has power to short haul existing routes by requiring an additional route to remedy undue prejudice in violation of Section 3. As pointed out by the Commission itself in *Nicholson Universal S. S. Co. v. Pennsylvania R. Co.*, 203 I. C. C. 637, at page 647, the Commission's power to require through routes and joint rates has been enlarged since its original enactment in 1906, while the wording of Section 3 enacted in 1887, "has remained substantially the same and does not include within its terms any reference to routes." Since that decision was issued, Congress expanded Section 3 to prohibit undue preference or advantage to any port, region or territory, but at the same time it added to that section the restrictive proviso—

> "* * * this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

From our discussion above and authorities there cited, this Court will find no occasion to give serious consideration to contentions of the Government and the Rio Grande that a finding of violation of Section 3 emasculates and renders ineffective the short-hauling prohibition in Section 15(4). Their arguments that a Section 3 finding justifies the short-hauling order in this case are pressed, apparently because their counsel recognize that the Com-

mission's own findings of fact afford no basis or support whatever for its order requiring through routes and joint rates via the longer and more onerous Rio Grande route, and in recognition of the further fact that in attempting to justify the short-hauling order under clause "(b)" of Section 15(4) the Commission mutilated, departed from and failed to make the jurisdictional findings required by that clause, as we have already noted above.

Plainly, the order is entirely vitiated and nullified by the Commission's failure to make the jurisdictional findings required by the standards and criteria of Section 15(4)(b), upon which its report definitely states that its order is based, and counsel may not substitute a new and different basis in their efforts to defend the order. The majority of the district court was clearly right in holding that if the Commission may order new through routes and joint rates that short haul existing routes as a remedy for undue prejudice and preference in violation of Section 3(1), "the prohibition of Sec. 15(4) would be practically emasculated."

Efforts of the Government and the Rio Grande to transform this case into an interterritorial case of undue preference and prejudice among shippers by emphasizing this Court's decision in *New York v. United States*, 331 U. S. 284, are unavailing and merit no consideration by this Court. That decision did not involve, as here, the case of an impecunious short line railroad attempting by its own complaint, to substitute its longer line for a "bridge" haul of traffic to be diverted from shorter, more efficient routes for the admitted purpose of improving its financial position. Instead, the decision involved an order resulting from an investigation covering most of the nation by the Commission pursuant to statutory

command, and requiring removal of undue preference and prejudice found as between interterritorial class rates paid by shippers.

The *New York* case did not involve the Commission's power to order through routes or joint rates, and it is entirely erroneous to suggest that the decision affords the slightest support for a contention that the Commission may lawfully order through routes and joint rates that short haul existing routes upon a finding of undue preference and prejudice in violation of Section 3. This is also true of the other cases cited, in the Jurisdictional Statements of the Government and the Rio Grande.

The suggestion at page 5 of the Government's Statement that the through routes required by the order are partly justified by the Commission's statement in its report that shippers of perishable products from the northwest territory "are debarred from effective participation" in the markets for such articles, merits no consideration because, first, the Commission's own statement is clearly fallacious since those same shippers of the same articles from the same points in the northwest area to the same destinations have the shorter, faster Union Pacific routes available at lower rates and have always shipped their products over those routes without complaint of any kind, second, because those shippers market their products in all 48 states and several foreign countries and, third, the order includes ordinary livestock and tombstones—articles that could not by any stretch of imagination be classified as perishable food products.

In short, so long as the Union Pacific routes are adequate to haul the traffic efficiently and economically, there can be no possible legal justification for requiring this

traffic to pass over the longer, more onerous Rio Grande route in its movement from the northwest area to the large consuming markets, such as Chicago, New York, Boston and others in the east and southeast portions of the country.

Contrary to the Rio Grande's suggestion at page 11 of its Statement, diversion of the traffic from the Union Pacific to the Rio Grande at Ogden for a bridge haul over the Rio Grande to Denver instead of through movement over the Union Pacific will not correct or relieve such isolated and hypothetical instances as there indicated at points in Kansas and Oklahoma which are several hundred miles from the eastern termini of the Rio Grande's line. The remedy for such situations, if any exist, is simply to remove pertinent restrictive routing provisions from the tariffs of carriers publishing *existing* through routes and joint rates, and not the establishment of new routes via the Rio Grande's longer line that short haul the shorter Union Pacific routes.

The Part of the Judgment of the District Court Involved in No. 118 Should Be Reversed

The appeal in No. 118 is from that part of the judgment of the district court which sustains the validity of the Commission's order insofar as it requires through routes and joint rates on shipments of the specified articles stopped for in-transit privileges, such as processing, storage, milling and grazing cattle, at points on the Rio Grande and later reshipment beyond its termini. In sustaining the order to that extent, the district court committed fundamental errors so obviously requiring reversal as to make it unnecessary for this Court to hear further argument.

First: Having correctly held that the evidence does not support or justify the Commission's finding that Union Pacific routes are inadequate and less economical than the Rio Grande, and, thus, rejecting and nullifying the fantastic and untenable grounds (*ante*, pp. 7-8), on which that finding and the whole order rests, the court plainly erred in refusing to annul and enjoin the entire order instead of enjoining it only as to shipments of the specified articles *not* stopped for in-transit privileges at points on the Rio Grande. For, if, as the court correctly held, the basic jurisdictional finding and fundamental premise on which the Commission based the order are legally, factually and rationally erroneous and untenable, then certainly the entire order is null and void, and the court clearly erred in refusing to enjoin and set it aside, instead of exceeding its own powers by devising a different but equally erroneous legal and factual basis for the order, as will be shown presently, in its efforts to save a part of it.

Second: The majority opinion of the district court clearly shows that the court proceeded on the wholly erroneous assumption that there are no transit privileges available on the Rio Grande, that the absence or lack of such privileges affords a legal basis for a finding that transportation service via the Rio Grande is "inadequate", and that the Commission's requirement of through routes and joint rates is justified in order to make such privileges available on the Rio Grande (App. D, pp. 11-12, Jurisdictional Statement, No. 118). But the fact is that all such privileges *are available* on the Rio Grande, as expressly stated in its complaint to the Commission, in the Commission's report and in the Rio Grande's Jurisdictional Statement at page 7, where it is plainly shown that the Rio Grande's complaint is not the absence or lack of in-transit

privileges on its line but the fact that shippers make no use of those privileges at points on its line for the traffic concerned because rates via the Rio Grande are so much higher than rates via the Union Pacific routes.

If, as the district court erroneously assumed, an absence or a lack of transit privileges on the Rio Grande's line were the cause of its inability to divert the traffic and revenues to its line, then no complaint to or order of the Commission was necessary, for it is settled by decisions of this Court and the Commission that establishment of a transit privilege is "a matter local to the railroad on which the transit point is situated", and that "[w]hether the privilege shall be granted or withheld is determined by the local carrier." *Central R. R. Co. v. United States*, 257 U. S. 247, 255.

As the majority decision below, in sustaining the validity of the order insofar as it requires through routes and joint rates on shipments of the specified articles stopped for in-transit privileges at points on the Rio Grande rests entirely on the false or erroneous assumption that those privileges are not now available on that line, we submit that, insofar as it sustains the order for such shipments the judgment is so clearly erroneous as to warrant no further argument for its reversal.

Third: The district court committed plain error in holding that as to shipments stopped for transit privileges at points on the Rio Grande, the order is valid because of its own finding that transportation via the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical," and, further, in sanctioning the Commission's use of its through route powers to

force a reduction in the Rio Grande's rates to equalize them with rates via Union Pacific routes. (App. D, pp. 12-13, Jurisdictional Statement, No. 118.)

The clear and unambiguous purpose of clause "(b)" of Section 15(4) (*ante*, p. 6, footnote 6), on which the Commission based the order, is to permit short-hauling *existing* routes where they do not furnish service that meets all of the tests specified in that clause and where improved service which meets the specified tests will be provided by a *proposed new route*. As correctly held by both the Commission and the district court, the *proposed* Rio Grande route could not be ordered without findings by the Commission that service furnished by *existing* Union Pacific routes does not meet the tests specified in clause "(b)", and that the *proposed* Rio Grande route is "needed" to provide service which would meet those tests. Unless the evidence justifies the "special findings" listed in clause "(b)", the authority there granted to short haul *existing* routes is not "applicable" and may not be used, *Thompson* case, *supra*, p. 555.

The Commission concluded erroneously, we submit, that *existing* Union Pacific routes are "inadequate" because they are "not available" at points on the Rio Grande and because higher rates apply at points on that line than at points on the Union Pacific routes. But the court, although holding that the evidence does not support the Commission's finding that transportation service via Union Pacific routes is inadequate or less economical than service via the Rio Grande and enjoining the order as to shipments *not* requiring stoppage at points on the Rio Grande for transit privileges, proceeded on the theory that the order could be justified as to

shipments requiring stoppage for transit privileges at points on the Rio Grande, if it could be found that transportation service via the *proposed* Rio Grande route is inadequate, and, thereupon, made its own finding that for such shipments the service via the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", and sustained the order for such shipments. (App. D, pp. 12-13, Jurisdictional Statement, No. 118.)

The court thus not only reverses and substitutes its own, for the Commission's approach and basis for its order but also reverses and distorts the statutory pattern and circumstances under which short-hauling *existing* routes is permitted under clause "(b)". In other words the court condemns the very route *proposed* to be established as "needed" to provide the "adequate, and more efficient or more economic, transportation", contemplated by clause "(b)".

While the court was clearly correct in holding that the Union Pacific routes, being shorter, faster and having lower rates than the proposed Rio Grande route, may not be condemned as inadequate and less economical than the Rio Grande route and that there is no basis in law or fact for the Commission's condemnation of the Union Pacific routes, we submit that upon that correct holding the court clearly erred in failing to enjoin and annul the order in its entirety, and, further, that the court grossly misconstrued clause "(b)" and proceeded upon a palpably erroneous and untenable theory in holding that clause "(b)" permits short-hauling the adequate, efficient and economic Union Pacific routes because it finds from the evidence that service via the Rio Grande "is inadequate and also inefficient and uneconomical."

It is clear beyond a shadow of doubt that the statute does *not* permit short-hauling the shorter, adequate, efficient and more economic Union Pacific routes for the purpose of equalizing their lower rates with the Rio Grande's higher rates, or for the purpose of improving the Rio Grande's service, or reducing the cost of it to shippers.

If the Commission is correct in its view that Union Pacific routes may be condemned as inadequate and less economical and short hauled by establishment of a longer route via the Rio Grande because higher rates apply on that line, and because the shorter Union Pacific routes with their lower rates are not available at points on the Rio Grande, then the Commission is at liberty to condemn and short haul every railroad and every through route in the country as inadequate and uneconomical and require them to short haul themselves by joining in through routes that pass through every point on every railroad in the country on the theory that such disregard of the short haul prohibition in Section 15(4) is necessary to provide adequate and more economic transportation.

If the court is correct in its view that the shorter, efficient, and adequate Union Pacific routes may be short hauled because service for shipments requiring transit at points on the *proposed* Rio Grande route "is inadequate and also inefficient and uneconomical", then every *existing* through route may be short hauled wherever the Commission can find a railroad that has higher rates and is inadequate, inefficient and uneconomical.

Neither of these plain distortions of the Act can afford any possible legal basis for the part of the order

sustained by the court, and, because both completely nullify the short-hauling prohibition of Section 15(4), and ignore the adequate, efficient and economic service admittedly provided by existing Union Pacific routes, the order clearly is void and must be annulled. *Interstate Comm. Comm. v. Nor. Pac. Ry.*, 216 U. S. 538; and *United States v. Mo. Pac. R. Co.*, 278 U. S. 269.

Fourth: Although the court correctly holds that transportation service is as economical via the Union Pacific routes as it would be via the Rio Grande under the Commission's order for traffic *not* requiring stoppage for transit at points on the Rio Grande, because the joint rates prescribed would *only equal* the joint rates via Union Pacific routes, it, nevertheless, holds that for shipments stopped for transit privileges at points on the Rio Grande, the through routes and joint rates prescribed by the Commission are necessary "to provide adequate and more economic transportation" and "will result in more economical transportation" (Appendix D, pp. 19 and 13, Jurisdictional Statement, No. 118). It is impossible, we submit, that "more economic" transportation than that provided by the shorter Union Pacific routes can be provided via the Rio Grande over its longer and more onerous route by simply reducing its higher rates to the exact level of rates maintained over Union Pacific routes. And, while reducing the rates via the Rio Grande will make transportation over that line cheaper for shippers than it is under its present combination rates, plainly a mere equalization of its rates with rates of Union Pacific routes will not provide "more economic" transportation within the meaning of clause "(b)", nor does it justify short-hauling Union Pacific routes. *Thompson* case, *supra*.

Fifth: In sustaining the Commission's finding that the Rio Grande route is "necessary and desirable in the public interest, in order to provide adequate and more economic transportation," the court sanctions and upholds jurisdictional findings by the Commission which clearly depart from and fail to comply with the statutory standards and criteria of clause "(b)", on which the Commission states its order is based. Under that clause, as noted above, *existing* routes may be short hauled if "the Commission finds that the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation," but the clause is "applicable only" where the Commission makes "the special findings" listed therein, *Thompson* case, *supra*, p. 555. The Commission in this case did not make "the special findings." It made only a part of them. It did not find that the Rio Grande route is "needed" or that it will provide "more efficient" transportation than that provided by Union Pacific routes. The Commission clearly may not select one or more of the several criteria from the statutory standard of clause "(b)" and disregard the others, for this Court, in dealing with the language of clause "(b)", said in *Pennsylvania R. Co. v. U. S.*, 323 U. S. 588, 592-593, that, "if the Commission is asked to abrogate the general rule with regard to the short-haul, the statute says it must have regard to several matters," the first of which is "adequacy of transportation" and the second and third are "efficient and economic transportation."

CONCLUSION

For the foregoing reasons, we submit that there is no warrant for the delay and expense of printing the record in these cases or for briefs and oral arguments, and that this Court should affirm the judgment of the dis-

trict court involved in the appeals in Nos. 117 and 119 and reverse the portion of the judgment below from which the appeal is taken in No. 118, and remand the case to the district court with direction to issue the injunction and relief prayed by the plaintiffs in that court.

Respectfully submitted,

BERT L. OVERCASH,
Counsel of record for the Five State Appellants,
State Capitol Building,
Lincoln, Nebraska.

ELMER B. COLLINS,
Counsel of record for Railroad Appellants,
1416 Dodge Street,
Omaha, Nebraska.

DON EASTVOLD,
ROBERT L. SIMPSON,
C. W. FERGUSON,
JAMES B. PATTEN,
GEORGE F. GUY,
CLARENCE S. BECK,
Of Counsel.

F. O. STEADRY,
L. E. TORINUS,
WARREN H. PLOEGER,
ROLAND J. LEHMAN,
EUGENE S. DAVIS,
JAMES C. WILSON,
Of Counsel.

PROOF OF SERVICE

I, ELMER B. COLLINS, one of counsel of record for Movants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 29th day of June, 1955, I served, on behalf of all Movants herein, copies of the foregoing Motion on the several adverse parties in Nos. 117, 118 and 119, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

E. Riggs McConnell, Esq.
Special Assistant to the Attorney General
Department of Justice
Washington 25, D. C.

and with first-class postage prepaid to:

Donald R. Ross, Esq.
United States Attorney
306 Post Office Building
Omaha, Nebraska

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq., Asst. General Counsel
Interstate Commerce Commission
Washington 25, D. C.

3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Henry B. Cockrum, Esq.
Acting Associate Solicitor
United States Department of Agriculture
Washington 25, D. C.

Charles W. Bucy, Esq.
Associate Solicitor
United States Department of Agriculture
Washington 25, D. C.

4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.
1116 Investment Building
Washington 5, D. C.

Dennis McCarthy, Esq.
Walker Bank Building
Salt Lake City 1, Utah

and with first-class postage prepaid to:

Harry L. Welch, Esq.
730 Farm Credit Building
206 South 19th Street
Omaha 2, Nebraska

5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co., and National Live Stock Producers Association, by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

Ray McGrath, Esq.
First National Bank Building
Omaha, Nebraska

ELMER B. COLLINS,
One of Counsel of Record for Movants Herein.